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Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; *and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147

Dear Ms. Dortch:

This letter responds to recent ex partes by a pair of CMRS carriers arguing that the Commission should expand its current unbundling rules to allow them to obtain the links between cell sites and mobile telephone switching offices (MTSOs) as unbundled dedicated transport.

As explained below, the simple fact is that CMRS carriers have thrived by provisioning these links using special access services, third-party alternatives, and/or their own facilities rather than UNEs. Consequently, they are not impaired in providing the service they seek to offer and, under section 251(d)(2) of the Act, are not entitled to use unbundled dedicated transport in this manner. The Commission therefore should not create a new, expanded transport UNE to cover cell-site to MTSO links and should not permit either CMRS carriers or CLECs serving such carriers to purchase unbundled dedicated transport in order to connect such links.

CMRS providers unquestionably are not impaired without access to the dedicated transport UNE for their wireless services. Every year since well before passage of the 1996 Act, wireless carriers have made huge strides in subscribership and revenue growth, expanded and upgraded their services, and invested billions of dollars in their networks – *all without access to unbundled network elements*. By the end of 2001, there were 130 million wireless subscribers, compared to 190 million wireline telephony subscribers, and wireless companies are adding subscribers much faster than their wireline counterparts. Wireless voice revenues nearly tripled between 1996 and 2001, and wireless subscribership and revenues both are expected to surpass the equivalent wireline numbers by 2006, if not before. Wireless minutes of use continue to grow at over 60

percent per year, while landline usage growth is nearly stagnant. *See generally* 2002 UNE Fact Report, II-34-35. This is not the stuff of impairment.

As an initial matter, by its express terms, the Act compels the Commission to consider impairment in the context of a requesting carrier's ability "to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2). As the D.C. Circuit has made clear, the Commission must "consider the markets in which a competitor 'seeks to offer' services and, at an appropriate level of generality, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services." *CompTel v. FCC*, 309 F.3d 8, 13 (D.C. Cir. 2002). In fact, the court pointedly suggested that the Commission lacks the power to require access to provide a particular type of service without first finding that competing providers are impaired in the ability to provide the specific service at issue. *Id.* ("it is far from obvious ... that the FCC has the power without an impairment finding as to non-local services, to require that ILECs provide EELs for such services.").

In the case of wireless services, given the phenomenal success that the wireless industry has experienced without access to unbundled dedicated transport, it is impossible to assume that they are impaired without such access. Nonetheless, two CMRS carriers have argued in recent ex partes that the FCC should expand its unbundling rules to give them access to unbundled dedicated transport between their cell-site and their MTSO's. Their arguments for doing so are without merit.

First, the CMRS carriers argue that there are no alternatives to ILEC special access services. But even if the CMRS carriers' claims were correct, which they are not, the supposed absence of alternatives to ILEC transport still does not demonstrate impairment. The section 251(d)(2) impairment inquiry, by its terms, focuses on the ability of requesting carriers to provide the services they seek to offer without access to UNEs. Here, CMRS carriers have thrived using ILEC special access, third-party alternatives, and their own microwave or fiber facilities.

Regardless, the CMRS carriers have the facts wrong. They provide little evidence other than self-serving statements to support their claim that they are dependent on ILEC special access for cell-site to MTSO links, and this claim seems fanciful. As Verizon has detailed elsewhere, the special access market is a competitive success story: non-ILEC providers have captured some 36 percent of the market, have built more than 1800 alternative fiber networks in the top 150 MSAs, have collocated in wire centers housing much more than half of special access demand, garnered approximately $10 billion in special access revenues in 2001, and serve approximately 140 million voice-grade equivalent special access lines over their own facilities. *See* 2002 UNE Fact Report at I-5; Special Access Fact Report.

Although much of this build-out is in metropolitan areas (where the majority of special access demand is located), there is ample evidence of alternative special access facilities in suburban and rural areas as well. *See* 2002 UNE Fact Report at III-7. Indeed, there are a multitude of alternative special access providers that explicitly market their services to wireless carriers. For example Cablevision's affiliate, Lightpath, states that it "focuses on the specialized needs of the

carrier industry, providing service to ... wireless providers." http://www.lightpath.net/solutions/industry/service/index.html. Moreover, it provides its connections for such carriers (including between the cell sites and the MTSO) on a scalable basis, "from 56K access through enterprise-scale T3 floodgates." *Id.* Any of the multitude of dedicated transport providers can (and do) offer similar service, with several highlighting their particular services to wireless carriers including Cox which offers DS-1 connections between the cell-site and MTSO as part of its "carrier access point to point services for wireless carriers". http://www.coxbusiness.com/systems/ri_rhodeisland/carrierservices.asp. *See also* American Fiber Systems Press Release, "AFS Names William J. Ciminelli as Vice President of Network Development and Services" (Jan. 10, 2003), available at www.americanfibersystems.com , and American Fiber Systems (AFS "leases fiber strands and or capacity to ... wireless carriers").

Moreover, CMRS carriers have been self-deploying cell-site-to-MTSO-links as a home-grown alternative. AT&T Wireless acknowledges, for example, that it "is finding it cost-effective in the long run to deploy alternative SONET ring transport in major metropolitan markets" and that it uses microwave transport in some circumstances. AT&T Wireless Jan. 7 ex parte at 11. And, it asserts that the number of T-1s per cell site is growing (*id.* at 9), which is certain to make it even more attractive for alternative providers to construct these facilities in order to meet burgeoning demand – as long as the Commission does not undermine their incentive to do so by making TELRIC-priced UNEs available.

Second, the CMRS providers claim that the cost differential between special access and unbundled dedicated transport itself constitutes an impairment. But CMRS providers have different price and cost structures from wireline carriers, giving them a variety of unique advantages and disadvantages. They cannot point to a single item of expense and claim impairment, especially in a market in which they have demonstrably succeeded without relying on unbundled dedicated transport. For example, AT&T Wireless bemoans the fact that it spends some $300 million a year on special access, but fails to note that this is only a bit more than two percent of its almost $15 billion in annual revenues. More importantly, the cost of special access, standing alone, does not and, indeed, cannot evidence impairment. *See AT&T v. Iowa Utilities Bd.,* 119 S.Ct. 721 at 735 (1999) (explaining that an impairment finding cannot be based on "*any* increase in cost").

In particular, AT&T Wireless and T-Mobile improperly ignore the very real cost advantages that CMRS carriers enjoy. *See USTA*, 290 F.3d at 423 ("the Commission nowhere appears to have considered the advantages CLECs enjoy in being free of any duty to provide underpriced service to rural and/or residential customers and thus of any need to make up the differences elsewhere"). Most notably, the costs of building out a wireless "loop" undoubtedly are well below the costs of deploying landline loops. Likewise, wireless carriers face no regulatory constraints on their pricing, are free of carrier-of-last-resort and unbundling requirements, and need not even offer their services for resale. Consequently, even if the marketplace evidence of non-impairment were not so compelling, AT&T Wireless and T-Mobile would have failed egregiously to carry their burden of demonstrating a statutory entitlement to unbundled transport.

Finally, differences between special access rates and TELRIC rates are not even relevant to the impairment analysis, contrary to AT&T Wireless and T-Mobile's contentions. *See USTA*, 290 F.3d at n.2 ("the closer the Commission's pricing principle is to the low end of what it may lawfully set, the greater the probability that lack of access would cause 'material diminution.'"). The ILECs' special access rates are competitively disciplined, as Verizon has comprehensively demonstrated in its response to AT&T's baseless petition to subject ILEC special access services to rate-of-return regulation – indeed, ILEC special access rates are well below levels that AT&T's now-captive access competitor once considered predatory – and the gap between TELRIC rates and special access merely confirms that TELRIC produces rates that are below competitive levels. *See* Opposition of Verizon, RM-10593, filed Dec. 2, 2002, at 20-24; Reply of Verizon, RM-10593, filed Jan. 23, 2003, at 5-8.

Third, CMRS providers claim that they can't compete with wireline service providers. Perhaps recognizing that they cannot demonstrate impairment in the provision of CMRS, AT&T Wireless and T-Mobile nonetheless contend that they will not be able to emerge as inter-modal competitors to landline voice telephony unless they are entitled to obtain unbundled transport at TELRIC rates. Contrary to these carriers' implication, however, CMRS providers need add nothing to their networks in order to compete with wireline voice service; they need only continue providing the same CMRS service they have offered so successfully without UNEs.

In addition, wireless carriers are proving themselves potent competitors to the ILECs without access to UNEs. As Chairman Powell just noted in his testimony to the Senate Commerce Committee, "nearly 6.5 million consumers report that their wireless phone is their only phone," and "the most significant competition in voice (local and long distance) has come from wireless phone service. As of June 2002, 129 million consumers subscribed to wireless telephone services, providing a direct alternative to wireline infrastructure for local telephone services." Written Statement of Chairman Michael K. Powell on Competitive Issues in the Telecommunications Industry, Jan. 14, 2003, at ii, 4. Wireless carriers, moreover, have replaced approximately 10 million wireline phone lines and have diverted billions of minutes off the ILECs' networks. Approximately 26 percent of all wireless minutes were previously carried on wireline networks, including a tremendous amount of traffic that otherwise would have been carried over the ILECs' switches. Given that there were approximately 300 billion wireless minutes of use in the first half of 2002 alone, *see* Karen Alexander, "Solving the Cellphone Maze One Twist at a Time," *New York Times* (Feb. 3, 2002), this means that more than 75 billion minutes that otherwise would have been handled by wireline networks were replaced with wireless usage just from January through June of 2002.

Furthermore, wireless carriers are replacing even primary wireline phone service at an increasing rate. As AT&T concedes, approximately three to five percent of all wireless subscribers have no wireline phone, and eleven percent consider their wireless phone their primary phone. And, according to T-Mobile – which here claims that unbundled transport is needed to enable wireless carriers to compete against ILECs – the proportion of wireless subscribers that will have abandoned their wireline phones is expected to increase to 11 percent by 2006 and "to a strong, and perhaps overwhelming majority share by 2012." Reply Comments of VoiceStream [now T-Mobile], CC Docket No. 01-321, filed Feb. 12, 2002, at 18. This estimate appears entirely

plausible: a major regional CMRS carrier, Leap Wireless, already reports that seven percent of its customers no longer use land lines and 61 percent of its customers use their cell phone as their primary line, employing land lines only for Internet connections. *See* Yuki Nogichi, "More Cell-Phone Users Cut Ties to Traditional Service," *Wash. Post*, Dec. 28, 2001, at E1. Plainly, the lack of access to unbundled transport for cell site-to-MTSO links is not restraining CMRS carriers from competing effectively in the provision of voice telephony.

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As the foregoing makes clear, the Commission must reject claims that CMRS carriers are impaired without access to unbundled transport for use in connecting cell sites and MTSOs. Accordingly, the Commission should decline requests to define a new, expanded dedicated transport UNE for this purpose – as explained in Verizon's filings in this docket, the existing transport UNE plainly does not encompass these links. *See* Comments of Verizon, CC Docket No. 01-338, filed April 5, 2002, at 112-113; 2002 UNE Fact Report at V-20-22. In addition, regardless of the definitional issue, the Commission should hold that both CMRS carriers and CLECs serving such carriers are not entitled to obtain unbundled transport in order to provide CMRS carriers with cell-site-to-mobile links. (Failing to include CLECs in this holding would enervate the Act's limits on unbundling by indirectly permitting that which the Act prohibits to be done directly.)

Please let me know if you have any questions.

Sincerely,

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